No. 89-1218

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JOSEPH F. SPANIOL, JR.
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In The

Supreme Court of the United States

October Term, 1989

BRENDA DOE, as next best friend of MICHELLE DOE, a minor,

Petitioner,

v.

BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, individually and as employees of the Illinois Department of Children and Family Services,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOBBITT, DUKES, ROBERTS and ULLMAN

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUZ
Solicitor General

ROSALYN B. KAPLAN*
KAREN MICHELS CARLE
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698
Of Counsel

100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Respondents

*Counsel Of Record

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QUESTION PRESENTED

Whether, in 1984, the law clearly established that the State's removal of a child from an abusive parent and its temporary placement of the child in the physical custody of relatives made state officials liable for any harm that might come to the child at the hands of the relatives.

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No. 89-1218

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BRENDA DOE, as next best friend of MICHELLE DOE, a minor,

Petitioner,

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BOOKER BOBBITT, SHIRLEY A. DUKES, DEVORAH ROBERTS and BARBARA ULLMAN, individually and as employees of the Illinois Department of Children and Family Services,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BOBBITT, DUKES, ROBERTS and ULLMAN

The respondents, Booker Bobbitt, Shirley Dukes, Devorah Roberts and Barbara Ullman, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion in this case. The opinion is reported at 881 F.2d 510 (7th Cir. 1989).

STATEMENT OF THE CASE[1]

Sometime in late 1983, Michelle Doe, age eleven, and Ronnie Doe, age six, were removed from their mother's (Brenda Doe's) home by the Juvenile Court because of Brenda's alcohol abuse. (A.30-31). The children were placed under the guardianship and protective custody of the Department of Children and Family Services ("DCFS") and temporarily moved to their aunt's (Margaret Proctor's) home. (A.31-32).

On December 16, 1983, Booker T. Bobbitt, an investigator with the Division of Child Protective Services (who was assigned to Michelle's case), visited Brenda in her home. (A.30-32). Brenda told Bobbitt that Michelle would not be safe if she remained in her aunt's home. (A.32). Brenda told Bobbitt that residents of the Proctor household abused drugs and alcohol, and that physical abuse frequently occurred among family members. (*Id.*).

On December 18, 1983, Bobbitt visited Michelle at her aunt's residence and spoke briefly with Michelle, her

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[1] References to the record will cite to the Appendix of Doe's petition when possible and will be indicated as (A. ___). Otherwise references will be made to the documents in the record before the United States Court of Appeals for the Seventh Circuit and will be indicated as (R.Doc. at p. ___).

This case was before the district court on a motion to dismiss the second amended complaint; therefore the facts alleged in the complaint are accepted as true. However, the record does not contain documentation or testimony supporting several factual statements included in petitioner's statement of the case. These unsupported statements are set forth in the Appendix herein.

aunt, Mrs. Proctor's nineteen-year-old daughter and Michelle's brother, Ronnie. (*Id.*). Based on these interviews, Bobbitt allowed Margaret Proctor to retain custody of Michelle and Ronnie pending the temporary custody hearing three days later. (*Id.*).

The custody hearing to determine Michelle's temporary placement took place on December 21, 1983 in the Circuit Court of Cook County, Illinois, Juvenile Division. (A.33). While in the Juvenile Court Building, Michelle complained to Booker Bobbitt and Devorah Roberts, a social worker employed by DCFS, Division of Child Protective Services, that she wanted to be removed from her aunt's home. (A.32-33). Michelle did not mention any sexual assaults upon her. (*Id.*).

At the temporary custody hearing, Brenda testified that drugs and alcohol were abused at the Proctor residence, that the family had repeated fights in the presence of the children, and that one of the male residents of the household had been accused of having a sexual affair with a young boy. (A.33).

Bobbitt testified that he had not conducted a detailed investigation of the Proctor household. (A.34). He explained that it was not his job to do a social investigation of the house, but rather to see if the home was safe enough for temporary placement of the children. (*Id.*). Bobbitt recommended Michelle's placement with her aunt as did Leo Wiggins, an employee of the Cook County Office of the Guardian Ad Litem appointed to represent Michelle's interests. (A.34).

At the conclusion of the hearing, the Juvenile Court appointed DCFS as temporary custodian of Michelle,

with permission to temporarily place Michelle with her aunt, and ordered further investigation of the Proctor residence for continuing placement. (A.35; R.Doc.45, Exhibit D, Report of Proceedings December 21, 1983 at p. 51). Accordingly, Michelle left the hearing in the custody of Margaret Proctor. (A.35). Thereafter, she became the victim of repeated sexual abuse by male members of the Proctor household. (A.35). The sexual abuse of Michelle was not reported or discovered through investigation until after Michelle was placed in a licensed foster home six weeks later. (R.Doc.29 at p. 6; A.41). Michelle sued for damages under 42 U.S.C. §1983. The second amended complaint alleged that respondents ignored Brenda Doe's warnings that the Proctor household was unsuitable and recklessly allowed Michelle to remain in her aunt's home, in violation of her substantive due process liberty interest. (A.29-44).[2]

The district court rejected respondents' motion to dismiss Michelle's §1983 claim on the grounds of qualified immunity, finding that the right Michelle claimed was clearly established in 1984, citing *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979). (A.14). Treating respondents' motion to dismiss as a motion for summary judgment, the Seventh Circuit reviewed all relevant decisional law and determined that in 1984, it had not been clearly established that placing a child in a potentially dangerous

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[2] Michelle's second amended complaint also contained claims under Illinois law for battery and intentional infliction of emotional distress. (A.45-47). The district court dismissed these claims against all defendants finding defendants absolutely immune from liability. (A.15).

environment in a relative's home was a violation of due process. (A.22-23). Accordingly, the court reversed the district court's decision denying respondents' motion to dismiss on the ground of qualified immunity. (A.24).

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE SEVENTH CIRCUIT USED THE PROPER STANDARDS IN AWARDING QUALIFIED IMMUNITY TO THE RESPONDENTS.

This Court has made clear that "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness of the action', assessed in light of the legal rules that were 'clearly established' at the time the action was taken." *Anderson v. Creighton*, 488 U.S. 635, 107 S.Ct. 3034, 3038 (1987) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed 2d 496 (1982)). In *Anderson v. Creighton*, this Court elaborated on the level of generality at which legal rights are "clearly established." This Court made clear that for a right to be clearly established it must have been articulated with a significant degree of particularity:

> [O]ur cases establish that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.

107 S.Ct. at 3039.

In determining that respondents were entitled to qualified immunity in the instant case, the Seventh Circuit premised its qualified immunity analysis on the question of whether it was clearly established in 1984 that public officials who place a child at risk of violence from private individuals in a foster home violate that child's constitutional rights. *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1989). (A.20-21).

Petitioner contends that the Seventh Circuit misapplied the applicable standard for determining the issue of qualified immunity by imposing an impermissibly narrow characterization of the right which Michelle alleges her DCFS caseworkers violated. (Petition, p. 11). By phrasing the right in question in such restrictive terms, petitioner argues, the court was able to avoid considering substantial case law in analogous areas, case law holding that a person in the custody and control of state officials has the right not to be placed at risk of a known danger by those charged with her care.[3] (Petition, p. 12).

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[3] Contrary to petitioner's implication that the Seventh Circuit did not consider the "analogous" case law cited in its petition, those cases were briefed before the court. Moreover, the Seventh Circuit referred to *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987), *cert. denied*, 109 S.Ct. 1337 (1989) which included an extensive discussion of *Youngberg v. Romeo*, 457 U.S. 307 (1982). *Doe v. Bobbitt*, 881 F.2d 510, 512 n.3 (7th Cir. 1989). (A.23). Likewise, the Seventh Circuit cited *Lojuk v. Johnson*, 770 F.2d 619 (7th Cir. 1985), *cert. denied*, 474 U.S. 1067 (1986), which expressly rejected both *Youngberg v. Romeo*, and *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) as controlling precedent for purposes of showing clearly established law under the qualified immunity doctrine for the due process claim arising out of Lojuk's therapy. *Doe v. Bobbitt*, 881 F.2d at 512. (A.23).

Petitioner urges the adoption of a broader construction of the right asserted by Michelle, that is a general affirmative right to protection for persons in the custody and control of state officials. (Petition, pp. 14-16).

Petitioner's proposal for a broader definition of Michelle's right which would ostensibly be covered by the cases cited in her brief (Petition, pp. 12-15), is contrary to the qualified immunity analysis established by this Court requiring specificity and particularity in defining the right. *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3039 (1987). The definition suggested by petitioner fails to particularize the nature of the custody and control in this case: temporary placement of a child in the physical custody and control of private actors (her relatives) at whose hands she suffered abuse. Consequently, as will be shown in the following argument, the case law upon which petitioner relies does not define "[t]he contours of the right" alleged by Michelle with sufficient clarity "that a reasonable official would understand that what he [wa]s doing violate[d] that right." *Anderson v. Creighton*, 107 S.Ct. at 3039.

Accordingly, the Seventh Circuit properly applied this Court's rulings in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), and *Anderson v. Creighton*, 438 U.S. 635 (1987), in finding that respondents were entitled to qualified immunity.

II. THE SEVENTH CIRCUIT'S DECISION IN AWARDING QUALIFIED IMMUNITY DOES NOT CONFLICT WITH ANY DECISIONS IN OTHER FEDERAL CIRCUITS.

The only issue in this case is whether it was clearly established in early 1984 that public officials who place a

child at risk of violence from private individuals in a foster home violate that child's constitutional rights.[4] Accordingly, a qualified immunity analysis is limited to pre-1984 case law. Yet, with the exception of *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981) and *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979), all of the cases cited by petitioner in support of her contention that the Seventh Circuit's decision awarding qualified immunity to respondents is in conflict with other circuits were decided after 1984.

Moreover, six of the nine cases cited by petitioner, including *Doe v. New York City Department of Social Services* and *Brooks*, are not qualified immunity cases. (*Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981); *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979); *Doe v. New York City Department of Social Services*, 670 F. Supp 1145 (S.D.N.Y. 1987); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (en banc), *cert. denied*, 109 S.Ct. 1337 (1989); *Lipscomb by and through DeFehr v. Simmons*, 884 F.2d 1242 (9th Cir. 1989); and *Doe "A" v. Special School District of St. Louis County*, 637 F. Supp. 1138 (E.D. Mo. 1986)). Rather, these cases involved the substantive issue of whether such a constitutional duty existed at all. Furthermore, none of the cases addressed the State's alleged affirmative duty of protection in terms of the circumstances of the case at bar: the State's emergency

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[4] Because it concluded that the state respondents were entitled to qualified immunity from petitioner's action for damages, the Seventh Circuit did not consider the substantive claim of a deprivation of her constitutional rights by the respondents.

removal of Michelle and her brother from the custody of their abusive mother, and the temporary placement of the children in the home of their aunt (who was not an agent of the State and whose home was not a licensed foster care facility), where the abuse Michelle sustained resulted at the hands of private actors.

Of the three cases petitioner cites which do address qualified immunity, petitioner misrepresents the holding in *L.J. by and through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 109 S.Ct. 816 (1989). The Fourth Circuit in *L.J.* did not hold that "at least after 1980, the date of the *Martinez* decision, [t]here existed a constitutional right to protection on the part of children in state custody or having a 'special relationship' with the State . . . " (Petition p. 20). The holding which petitioner cites is that of the district court, which based its denial of qualified immunity on two different theories, constitutional and statutory. The Fourth Circuit affirmed the district court's denial of qualified immunity, but only on the statutory theory. *Id.* at 122. The court stated: "Our conclusion makes it unnecessary to decide whether plaintiffs' constitutional rights were also violated prior to 1980 . . . ." *Id.*

The remaining two cases cited by petitioner addressing qualified immunity are related cases dealing with sexual abuse of two female students by the same teacher. *Stoneking v. Bradford Area School District*, 856 F.2d 594 (3rd Cir. 1988), *vacated and remanded for further consideration in light of DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998 (1989), *affirmed on different grounds*, 882 F.2d 720 (3rd Cir. 1989); *Sowers v. Bradford Area School District*, 694 F.Supp. 125 (W.D. Penn. 1988), *affirmed* 869

F.2d 591 (3rd Cir. 1988), *vacated and remanded for further consideration in light of DeShaney*, 109 S.Ct. 1634, *affirmed on remand*, 887 F.2d 262 (3rd Cir. 1989). In both cases, the judgment of the Third Circuit finding that plaintiffs had stated a cause of action under §1983 was vacated by the United States Supreme Court and remanded for further consideration in light of *DeShaney v. Winnebago County of Social Services*, ___ U.S. ___, 109 S.Ct. 998 (1989).[5]

On remand, the court in *Stoneking* affirmed its finding that plaintiff had a viable §1983 claim, but on grounds other than that school officials had an affirmative duty to protect students from harm perpetrated by a teacher. Relying on *Ingraham v. Wright*, 430 U.S. 651 (1977) (due process right to be free from corporal punishment in schools), the court stated that a student's right to be free from a teacher's sexual molestation was clearly established. Id. 726-727. Unlike *Stoneking*, in the instant case there was no clearly established law in 1984 to put respondents on notice that their conduct violated Michelle's substantive due process rights. Even the court in *Stoneking* recognized the uncertainty of the law regarding an affirmative duty of state officials to protect children in foster homes. *Id.* at 724.

In attempting to meet her burden as required by this Court in *Davis v. Scherer*, 468 U.S. 183, 197 (1984),

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[5] Only the Third Circuit's decision in *Stoneking v. Bradford Area School District*, 882 F.2d 720 (3rd Dist. 1989) is a published decision, so respondents' discussion will be limited to *Stoneking*. Presumably *Stoneking* and *Sowers* were affirmed on the same grounds since the relevant allegations in the complaints were identical.

petitioner cites only two cases in the foster care context as support for her contention that in 1984 she was entitled to an affirmative right to protection: *Doe v. New York City Department of Social Services*, 649 F.2d 134 (2d Cir. 1981), *cert. denied*, 464 U.S. 864 (1983), and *Brooks v. Richardson*, 478 F. Supp. 793 (S.D.N.Y. 1979). (Petition, pp. 15-16, 18). Neither case is representative of the circumstances in the case at bar. The Seventh Circuit rejected *Doe v. New York City Department of Social Services* as valid authority, finding it not directly on point since it involved placement in a licensed foster home on a permanent basis, whereas the instant case involved placement with Michelle's aunt, (whose home had not been licensed as a foster home), on a temporary basis. (A.23). Moreover, the Seventh Circuit noted that the decision in *Doe v. New York City Department of Social Services* depended upon an absolutely novel analogy between incarceration and placement in a foster home, an analogy that has yet to be endorsed by this Court. *Id.*[6] *Brooks v. Richardson, supra*, is distinguishable on similar grounds.

In light of the dearth of authority establishing as of 1984 that the State had an affirmative obligation to protect the children it placed in foster care, petitioner proposes that respondents should have known their actions violated her constitutional rights from "analogous" case law in existence at the time.[7] (Petition, pp. 12-15). These

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[6] *DeShaney v. Winnebago County Department of Social Services*, ___ U.S. ___, 109 S.Ct. 998, 1006 n.9 (1989).

[7] Four of the cases cited by petitioner were decided after the events in this case and were therefore not available

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cases recognize the right to protection for those persons in the physical custody and control of state officials; specifically prison inmates in *Estelle v. Gamble*, 429 U.S. 97 (1976) and involuntarily committed patients in *Youngberg v. Romeo*, 457 U.S. 307 (1982).[8] The rationale underlying the affirmative duties imposed in *Youngberg* and *Estelle* is that by taking an individual into custody, the State renders him unable to care for himself. *Youngberg*, 457 U.S. at 317, 102 S.Ct. at 2458-59. This helplessness arises because the State has removed and isolated the individual from the community and placed him under direct control of the institutional authorities. *Id.*

By contrast, a child placed in foster care is not in custody in the sense of *Youngberg* and *Estelle*. In an opinion written for this Court by Justice Powell just twelve days after he wrote on behalf of the Court in *Youngberg v. Romeo*, this Court held that foster children are not in the

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authority at the time this action arose: *Jensen v. Conrad*, 747 F.2d 185 (4th Cir. 1984); *Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1985); *Garrett v. Rader*, 831 F.2d 202 (10th Cir. 1987); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988) *cert. denied*, 109 S.Ct. 1338 (1989). (Petition, pp. 12-14).

[8] Petitioner also cites *Martinez v. State of California*, 444 U.S. 277 (1980) as intimating that an affirmative right to protection under the Fourteenth Amendment could arise outside the prison context under conditions where state officials were aware that their actions caused an identifiable person to be placed at risk of harm from a third party. (Petition, p. 13). Language suggesting this possibility was noted by this Court to be dicta in the *Martinez* holding. *DeShaney v. Winnebago County Department of Social Services*, 109 S.Ct. 998, 1004 n.4 (1989).

custody of the State. *Lehman v. Lycoming County Children's Services*, 458 U.S. 502, 510-11 (1982). Justice Powell stated that a foster child is in a wholly different position than an incarcerated prisoner or an institutionalized patient. In particular, the Court ruled that children placed in foster homes "are not in the 'custody' of the State." *Id.* at 510. The Court in *Lehman* concluded that foster care was not sufficiently analogous to incarceration or institutionalization to give rise to constitutional obligations under the habeas clause.

Thus, based on the inherent differences in incarceration/involuntary institutionalization and placement in foster care, it cannot be said that the analogous case law cited by petitioner "clearly established" during the relevant period an affirmative right to protection for persons placed in foster care by state officials.

Included in petitioner's argument that the Seventh Circuit's decision in granting qualified immunity conflicts with the decisions of several other federal circuits is a reference to this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, ___ U.S.___, 109 S.Ct. 998 (1989), and the area left open in *DeShaney*: whether an affirmative duty to protect analogous to that connected with incarceration or institutionalization would have arisen if the State had removed Joshua from free society and placed him in a foster home operated by its agents. *Id.*, 109 S.Ct. at 1006 n.9. (Petition, pp. 17-18, 22-23). Petitioner states that several federal circuits have recently rendered decisions which fall into the area left open by *DeShaney* and that a number of these cases have

refused to grant qualified immunity to officials responsible for placing or maintaining a child in an abusive environment.[9] (Petition, p. 18).

First of all *DeShaney* was decided five years after the events in this case took place. Thus, *DeShaney* cannot be relied upon by petitioner in a qualified immunity analysis of whether the law was clearly established in 1984. Moreover, there would be no need to consider the question left open by *DeShaney*, because the circumstances of this case fall within the *DeShaney* holding. In *DeShaney*, this Court held that respondents' failure to provide petitioner with adequate protection against his father's violence did not violate his rights under the substantive component of the Due Process Clause. *Id.* at 1003. The Court explained that a State's failure to protect an individual against private violence generally did not constitute a violation of the Due Process Clause because the Due Process Clause imposed no duty on the State to provide members of the general public with adequate protective services. *Id.* at 1002-1004. Like *DeShaney*, petitioner was in the physical custody of a private party, her aunt, who was in no sense a state actor.[10] She was not placed in a foster care facility

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[9] As previously established herein, petitioner has cited no cases denying qualified immunity arising out of allegations of physical or sexual abuse in the foster care context. Yet the following recent Court of Appeals cases did grant immunity, qualified or absolute, under such circumstances: *Eugene D. v. Karman*, 889 F.2d 701 (6th Cir. 1989); *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989).

[10] See: *Milburn v. Anne Arundel County Dept. of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 148

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run by state agents, nor was she placed with a family in a licensed foster home. Hence, petitioner does not fall into the area left open by the *DeShaney* decision.[11] For these reasons, discussion of the *DeShaney* case is irrelevant to petitioner's argument.

Thus, as demonstrated herein, the Seventh Circuit's decision to grant qualified immunity to respondents does not conflict with any decision in the other circuits.

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(1989) (foster parents were not state actors for purposes of §1983 suit brought by foster child for alleged acts of child abuse where State exercised no coercive power over foster parents).

[11] Petitioner also claims that the Seventh Circuit has misread the rule of *DeShaney* to mean that no child has an affirmative right to protection whether she is in the custody of her natural parents, or in the custody or under the control of state officials. (Petition, p. 22). The Seventh Circuit only cited *DeShaney* in passing to indicate that not only was there no Supreme Court case in 1984 on the issue in this case, but also that the issue has not been confronted by this Court to date. (A.22).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General
State of Illinois

ROBERT J. RUIZ
Solicitor General

100 W. Randolph Street
12th Floor
Chicago, Illinois 60610
(312) 814-3312

Attorneys for Respondents.

ROSALYN B. KAPLAN *
KAREN MICHELS CAILLE
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3698
Of Counsel

* COUNSEL OF RECORD

APPENDIX

The record does not contain documentation or testimony supporting the following statements included in petitioner's statement of the case:

Page 5, Paragraph 2, last sentence:
"Bobbitt did not give the children an emergency phone number, or any other method of contacting him."

Page 6, Paragraph 1, sentences 2 and 3:
"Both Daniel and Ronald were involved, subjecting Michelle and their sister, Margaret, to genital, oral and anal intercourse, and lewd fondling. Michelle's uncle kissed and fondled her in an inappropriate manner on other occasions during this period."

Page 7, Paragraph 1, last three sentences:
"After a month of ignoring Roberts's observations, Ullman advised Roberts that the children would remain in the aunt's and uncle's home at least until the next scheduled court date, on February 23, 1984. Ullman finally told Roberts to quit or she would be fired. Roberts quit."

Page 8, Paragraph 1, sentences 1, 2 and 4:
"On January 26, 1984, after Roberts quit, Michelle's case was assigned to yet another caseworker, Bruce Monroe. After approximately six visits with Michelle over the course of two weeks, Monroe exercised his professional discretion and had Michelle removed from her aunt's and uncle's home. . . . Her uncle and cousins were arrested."

Page 8, Paragraph 2:
"In the Circuit Court of Cook County, Illinois, Criminal Division, Michelle's uncle and cousins pled guilty to various felony charges stemming from the sexual attacks on Michelle. Her uncle was put on probation. The cousins, Daniel and Ronald, were sent to prison."